

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



Wisconsin Department of Regulation & Licensing Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name as it appears on the order.*
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: <http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscca>.
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	FINAL DECISION AND ORDER
MARK S. LUBINSKY, M.D.,	:	<u>LS 0703281 MED</u>
RESPONDENT.	:	

[Division of Enforcement Case # 04 MED 050]

The parties to this action for the purposes of Wis. Stat. § 227.53 are:

Mark S. Lubinsky, M.D.
8701 Watertown Plank Road
Milwaukee, WI 53226

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Wisconsin Medical Examining Board
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

A Notice of Hearing and Complaint were filed and served in this matter on March 28, 2007. Prior to the hearing or the formal complaint, the parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Medical Examining Board. The Board has reviewed the attached Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Mark S. Lubinsky, M.D., Respondent, date of birth March 19, 1948, is licensed by the Wisconsin Medical Examining Board to practice medicine and surgery in the state of Wisconsin, pursuant to license number 19698, which was first granted October 17, 1975.

2. Respondent has not renewed his registration since it expired on October 31, 2005, but could renew it pursuant to Wis. Stat. § 440.08(3)(a) and Wis. Adm. Code § MED 14.06(2)(a) by payment of fees and proof of completion of continuing education requirements.

3. Respondent's last address reported to the Department of Regulation and Licensing is 8701 Watertown Plank Road, Milwaukee, WI 53226. That address is no longer current and Respondent has not updated his address since his registration expired.

4. From 1990 until his resignation on February 17, 2004, Respondent was employed in the Department of Pediatrics at the Medical College of Wisconsin (MCW) in Milwaukee, Wisconsin and had clinical privileges at Children's Hospital of Wisconsin. His practice was primarily in pediatric genetics, an area with a very high patient mortality rate.

5. In the fall of 2003, Respondent began using his computer at MCW to access, download, and view adult and

child pornography on the internet. This was discovered on January 29, 2004, by an MCW computer technician who was updating the virus protection on Respondent's computer at Respondent's request. The technician notified his supervisors and MCW began an investigation and notified the Federal Bureau of Investigation (FBI).

6. The investigation determined that Respondent had downloaded more than 600 images of child pornography on his computer. Ten percent of those images had been opened and viewed. The computer files that Respondent accessed contained visual depictions of prepubescent minors or minors under the age of twelve years engaging in sexually explicit conduct.

7. On February 6, 2004, Respondent was summarily suspended from the MCW medical staff pending completion of the investigation and peer review. On February 17, 2004, Respondent resigned his membership and privileges on the MCW hospital staff, without admitting any of the allegations. Respondent has not worked as a physician or practiced medicine since February 6, 2004.

8. As a result of the investigation, a federal grand jury in the United States District Court for the Eastern District of Wisconsin issued an indictment which charged Respondent with having violated 18 United States Code § 2252A(a)(2)(A), between approximately November 7, 2003 and November 29, 2003, by knowingly receiving visual depictions which showed minors engaged in sexually explicit conduct, which had been mailed, shipped and transported in interstate and foreign commerce. The indictment was filed on September 28, 2004 and commenced the prosecution of the Respondent as United States v. Mark S. Lubinsky, Case Number 04-CR-228 (E.D. Wis.).

9. On January 22, 2007, the U. S. Attorney filed an Information in Case Number 04-CR-228, which charged Respondent with having violated 18 USC § 2252A(a)(5)(B), on or about January 29, 2004, by knowingly possessing visual depictions of minors engaging in sexually explicit conduct, which depictions had been transported in interstate and foreign commerce.

10. On January 22, 2007, pursuant to a written plea agreement, the Respondent entered a plea of guilty to the amended charge of possession in the Information and admitted to facts which established his guilt beyond a reasonable doubt and the Government agreed to move to dismiss the original grand jury indictment at the time of sentencing.

11. Prior to sentencing, the Court ordered that a sex offender evaluation be done of Respondent. It was the opinion of the psychologist who did the evaluation that:

- a. There was no evidence that Respondent was a pedophile.
- b. Respondent was suffering from severe depression at the time of the conduct. The depression was exacerbated by his inability to cope with the emotional needs of the children he was treating with severe genetic defects and their families (compassion fatigue).
- c. Respondent's statements were believable that: he saw himself as a bad doctor because there was nothing he could do to save many of his patients; he looked at pornography to provide another reason to dislike himself and for the purpose of self destruction.
- d. Data did not suggest that Respondent was a threat to children or society.

12. On November 2, 2007, a judgment of conviction was entered against the Respondent in case number 04-CR228 of violating 18 USC § 2252A(a)(5)(B). Respondent was sentenced to 18 months in federal prison, with a recommendation by the judge that it be served at the Federal Medical Center or a minimum security camp, followed by three years of supervised release.

13. 18 USC § 2252A(a)(5)(B) is a law the circumstances of which substantially relate to the circumstances of the practice of medicine.

CONCLUSIONS OF LAW

1. The Wisconsin Medical Examining Board has jurisdiction over this matter pursuant to Wis. Stat. § 448.02(3), and has authority to enter into this stipulated resolution of this matter pursuant to Wis. Stat. §§ 227.44(5) and

2. Respondent, by engaging in the conduct set out above, violated a law the circumstances of which substantially relate to the circumstances of the practice of medicine, which is unprofessional conduct as defined by Wis. Admin. Code § MED 10.02(2)(z) and is subject to discipline pursuant to Wis. Stat. § 448.02(3).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The SURRENDER by Mark S. Lubinsky, M.D., Respondent, of his license to practice medicine and surgery in the state of Wisconsin and his right to renew that license is hereby ACCEPTED.

2. If Respondent ever applies for any credential from the Board:

a. He shall meet the criteria then required of original applicants for that credential.

b. The Board shall make such inquiry as it finds necessary to determine whether the applicant is competent to practice, and shall impose any reasonable conditions on reinstatement of the license, including oral examination, as the Board deems appropriate.

c. He shall provide proof sufficient to the Board that he does not have a psychological condition which may interfere with his ability to practice with reasonable skill and safety to patients.

d. The decision whether to grant Respondent a credential, with or without limitations, shall be in the sole discretion of the Board.

e. Prior to the granting of any credential by the Board, he shall have paid the costs of this proceeding in the amount of \$1,950.00, pursuant to Wis. Stat. § 440.22(2). Payment shall be made payable to the Wisconsin Department of Regulation and Licensing, and mailed or delivered to:

Department Monitor
Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264

3. This Order is effective on the date of its signing.

Wisconsin Medical Examining Board

By: Gene Musser MD
A Member of the Board

12/12/07
Date

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	STIPULATION
MARK S. LUBINSKY, M.D.,	:	<u>LS 0703281 MED</u>
RESPONDENT.	:	

[Division of Enforcement Case # 04 MED 050]

It is hereby stipulated and agreed, by and between Mark S. Lubinsky, M.D., Respondent; Raymond M. Dall’Osto o Gimbel, Reilly Guerin & Brown and Thomas J. Awen, Law Offices of Thomas J. Awen, attorneys for Respondent; and John R. Zwieg, attorney for the Complainant, Department of Regulation and Licensing, Division of Enforcement, as follows:

1. This Stipulation is entered into as a result of a pending disciplinary proceeding against Respondent's licensure by the Division of Enforcement (DOE file 04 MED 050). Respondent consents to the resolution of this investigation by stipulation and without a hearing.
2. Respondent understands that by signing this Stipulation, he voluntarily and knowingly waives his rights, including: the right to a hearing on the allegations against him, at which time the state has the burden of proving those allegations by a preponderance of the evidence; the right to confront and cross-examine the witnesses against him; the right to call witnesses on his behalf and to compel their attendance by subpoena; the right to testify himself; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded to him under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, the Wisconsin Administrative Code, and any other provisions of state or federal law.
3. Respondent has obtained advice of legal counsel prior to signing this Stipulation.
4. Respondent agrees to the adoption of the attached Final Decision and Order by the Board. The parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties. Respondent waives all rights to any appeal of the Board's Order, if adopted in the form as attached.
5. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation, and the matter shall be returned to the Division of Enforcement for further proceedings. In the event that this Stipulation is not accepted by the Board, the parties agree not to contend that the Board has been prejudiced or biased in any manner by consideration of this attempted resolution.
6. Attached to this Stipulation are Respondent’s most recent wall and wallet registration certificates. If the Board does not accept this Stipulation, Respondent’s certificates shall be returned to Respondent with a notice of the Board’s decision not to accept the Stipulation.
7. The parties to this Stipulation agree that the attorney or other agent for the Division of Enforcement and any member of the Board ever assigned as a case advisor in this investigation may appear before the Board in open or closed session, without the presence of Respondent or his attorney, for purposes of speaking in support of this agreement and answering questions that any member of the Board may have in connection with the Board’s deliberations on the Stipulation. Additionally, any such case advisor may vote on whether the Board should accept this Stipulation and issue the attached Final Decision and Order.
8. Respondent is informed that should the Board adopt this Stipulation, the Board’s Final Decision and Order is a public record and will be published in accordance with standard Department procedure.
9. The Division of Enforcement joins Respondent in recommending the Board adopt this Stipulation and issue the attached Final Decision and Order.

Mark S. Lubinsky, M.D.
Respondent
8701 Watertown Plank Road
Milwaukee, WI 53226

Date

Raymond M. Dall'Osto
Gimbel, Reilly, Guerin & Brown
Attorneys for Respondent
330 E. Kilbourn Avenue #1170
Milwaukee, WI 53202-3146

Date

Thomas J. Awen
Law Offices of Thomas J. Awen
Attorneys for Respondent
740 N. Plankinton Avenue, Suite 530
Milwaukee, WI 53203

Date

John R. Zwieg
Attorney for Complainant
Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708-8935

Date

[04 MED 050: Costs \$1,950.00]

H:\jej\legal\LubinskyMDsurrstp.doc